IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.208 OF 2007

Shri Pralhad Mahadeorao Ghorpade. ..Appellant.

V/s.

Sau. Shalan Vilas Khandagale. ..Respondent.

Mr.A.Kumbhakoni for appellant.

CORAM: A.M.KHANWILKAR,J

DATE : JULY 16, 2007.

P.C. :

1. Heard counsel for the appellant.

2. The entire effort of the appellant was to persuade this Court to hold that the appellant has succeeded to the property by virtue of Will dated 28th August, 1995, left behind by Malanbai bequeathing the suit property to the appellant. It is however, fairly accepted by the counsel for the appellant that although the appellant had filed counter claim in the subject suit, the said counter claim has been dismissed by the trial Court. That decree passed by the trial Court was not carried in appeal by the appellant. In other words, the counter claim of the appellant to get the relief of possession of the suit property on the assertion that

he has become owner of the suit property on account of the said Will has been rejected by the trial Court. In that case, it will have to be assumed that the ownership of the suit property is that of the respondent, being daughter of the deceased Malanbai-original owner and having inherited the suit property as the legal heir and representative of the deceased Malanbai after the demise of Malanbai on 12th February, 1996. It would have been a different matter, if the appellant was to get the Will probated or in any case, declaration that he has become owner of the suit property on the basis of the Will dated 28th August, 1995, within period of limitation after the demise of Malanbai on 12th February, 1996.

3. Whereas, the counter claim filed by the appellant, as is fairly accepted by the counsel for the appellant, was on 12th October, 1999. Admittedly, no declaration was asked that the Appellant has become the owner of the suit property by virtue of the stated Will. Significantly, the remedy of appellant to seek such declaration had already become time barred on that date. That plea therefore, cannot be now set up in a suit for injunction by the real owner, who has become owner by virtue of being daughter of the deceased Malanbai,

after the demise of Malanbai on 12th February, 1996. As the limitation for seeking declaration in relation to the Will dated 28th August, 1995 has become time barred, the appellant cannot be heard to resist the claim of the respondent/plaintiff in the suit for injunction filed by the respondent asserting title in respect of the suit property.

4. Counsel for the appellant contends that the two Courts below have not addressed the matter in this perspective. That makes no difference for deciding the Second Appeal. Besides, it is well established that the issue regarding any claim being barred by limitation, will have to be addressed by the Court even if, such specific issue is not raised by the party to the suit, by virtue of section 3 of the Limitation Act.

5. To get over this position, counsel for the appellant would contend that in the counter claim the limited relief that was claimed by this appellant was of possession and the fact that the claim of the appellant founded on the Will dated 28th August, 1995 being barred by limitation will be of no consequence. It is not possible to accept this submission. The appellant can succeed in getting relief of possession

only upon establishing his ownership with regard to the suit property and in no other manner. The appellant having failed to seek declaration with regard to the suit property in the context of Will dated 28th August, 1995, cannot simplicitor use that Will to buttress the claim of possession asked in the counter claim. As aforesaid, unless the appellant was to establish title in respect of suit property could not be heard to claim relief of possession. I am conscious of the fact that I am not addressing the matter in relation to the counter claim or the relief claimed thereunder by the appellant, but the reason stated hereinbefore is of some significance for considering whether the appellant can be heard to resist relief of injunction claimed by the respondent on the basis of title in respect of the suit property.

6. Accordingly, in my opinion, no substantial question of law arises in this Second Appeal. Hence dismissed.

(A.M.KHANWILKAR,J)